

89-644

No. _____

Supreme Court, U.S.

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**In The
Supreme Court of the United States
October Term, 1989**

HELEN ROBINSON,
Petitioner,

-VS-

THE TOWNSHIP OF WATERFORD, OFFICER DONALD BAILEY
OFFICER TIMOTHY TARPENING, PETER DONLIN AND WALTER BEDELL

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

AND APPENDIX

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22/10/89



QUESTIONS PRESENTED FOR REVIEW

I.

CERTIORARI SHOULD BE GRANTED TO CLARIFY THE WEIGHT TO BE GIVEN TO A SPECIFIC INTENT REQUIREMENT IN AN ORDINANCE (OR STATUTE) WHICH IS OTHERWISE CONSTITUTIONALLY VOID-FOR-VAGUENESS.

II.

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS RELATIVE TO THE PROPER STANDARD OF REVIEW ON THE QUESTION OF THE VERDICT BEING AGAINST THE GREAT WEIGHT OF THE EVIDENCE.

III.

CERTIORARI SHOULD BE GRANTED TO CLEARLY DEFINE THE SCOPE OF THE FEDERAL COURTS AUTHORITY AND RESPONSIBILITY WHEN EXERCISING PENDANT JURISDICTION OVER STATE LAW CLAIMS

PARTIES TO PROCEEDINGS

Petitioner, Helen Robinson, is the duly appointed personal representative of the estate of William Robinson, deceased. She is also his widow. She has brought this action on behalf of the decedent's estate, his next of kin as defined by MCLA 600.2922 and herself.

Defendant Waterford Township is a municipality existing by virtue of the constitution of the State of Michigan.

Defendants Tarpening and Bailey are police officers, employed by the Township of Waterford. They are respondents in this Court.

No other named defendant is a respondent herein.

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OPINIONS BELOW

On August 18, 1989, the United States Court of Appeals for the Sixth Circuit issued its opinion, affirming in part, reversing in part and remanding the decision of the district court. That opinion (A1) is unpublished.

On September 21, 1989, the United States Court of Appeals for the Sixth Circuit entered its order denying Petitioner's timely filed Motion for Rehearing (B1).

SUPREME COURT JURISDICTION

Petitioner seeks review of portions of the opinion of the United States Court of Appeals for the Sixth Circuit and its order of September 21, 1989. That order denied Petitioner's timely filed Motion for Rehearing. She invokes the certiorari jurisdiction conferred on this Court by 28 USC §1254(1).

STATUTE INVOLVED

42 USE §1983 provides:

§ 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case arises out of a tragic series of events which began over the Memorial Day weekend in 1980 at the Sears Department store in the Pontiac Mall, located in the Township of Waterford, Oakland County, Michigan.

Petitioner's decedent, William Robinson, was a retired factory worker who suffered from Alzheimer's Disease, a degenerative condition which causes the brain to atrophy, and with its progression, robs its victim of most intellectual functions. Due to his condition, Mr. Robinson, was forgetful, unable to communicate in any meaningful manner, was incontinent of urine and bowel, was unable to clean himself and tended to frequently wander from home, despite efforts to restrict his movements by his family. As a result, he was extremely odoriferous, frequently seen chewing paper and other foreign objects and mumbling to himself.

During those occasions that he wandered from home, Robinson frequently journeyed to the Pontiac Mall. His strong odor

and peculiar behavior attracted attention from shoppers, and as a consequence, he was unpopular with mall shopkeepers.

Several times prior to the incident underlying this action, Waterford Township Police officers were called to the mall to remove Robinson from the premises. On those occasions the Township officers would transport Mr. Robinson to his home, to the Pontiac Mission or Salvation Army shelter or on some occasions he was then taken to the Waterford Township boundary and simply left outside of the Township limits. These practices, constitutionally questionable in and of themselves, made Robinson fairly well-known by officers of the Township Police Department, particularly Defendant Donald Bailey.

On Saturday, May 24, 1980, Robinson again wandered to the Sears department store located on the mall premises. Defendant Bailey received a telephone call at the Township Police Station from Gregory Palmer, a Sears security employee, advising that Robinson was again in the store. No activity or conduct attributed to Robinson was described during this conversation. Although no legal activity had been described and Bailey himself had no observed Robinson commit any crime (indeed Bailey never saw Mr. Robinson on any occasion, but had only heard of him through other officers after their contacts with him as described above), Bailey, then a corporal, contacted Defendant Timothy Tarpening, a patrol officer, by radio and ordered that Robinson be arrested. There was no indication from Bailey during this communication as to the reason Robinson was to be arrested.

Bailey later testified in this action, admitting that he was unaware of any law that Robinson had purportedly violated at the time he gave the order for the decedent's arrest. He further admitted that the sole reason the decedent's arrest was ordered was that with the holiday weekend in progress, he wanted the decedent "out of the eyes of the general public".

Consistent with this instruction, Defendant Tarpening arrived at the Sears store, located the decedent and placed him under arrest. In his report, prepared immediately after Robinson's arrest Tarpening, wrote:

Investigation: I was dispatched to Sears to arrest William Robinson for loitering. WTPD has received numerous calls about the subject loitering at Sears, Hudsons and the Pont. Mall in general. Mr. Robinson has been warned and transported home numerous times in the past. Subject was taken to O.C.J. and lodged. Due to his personal hygiene Robinson was not booked at this time. Robinson was arrested as he was wandering around in Sears. Disposition open advised by Cpl. Bailey to make arrest.

Tarpening would later testify in this matter offering at least three different and sharply conflicting accounts of his contact with Robinson at the store. However, as we will discuss below, none of these accounts describe any activities or conduct attributable to Robinson which is evenly arguably illegal.

Robinson was charged with violation of Section 5.3 of Waterford Township Ordinance 87, entitled "Disorderly Conduct Ordinance". Section 5 of this ordinance states in its totality (including 5.3) the following:

5.0 HARASSMENT. A person commits the offense of harassment if, with intent to harass, annoy or alarm another person, he or she:

5.1 Strikes, shoves, kicks or otherwise touches a person or subjects him or her to physical contact.

5.2 Follows a person in or about a public place or places.

5.3 *Engages in a course of conduct or repeatedly commits acts that alarm or seriously annoy another person, and which acts or conduct serve no legitimate purpose.*

5.4 Contributes to the delinquency of a minor by any act, or by any word, shall contribute toward, cause or tend to cause any minor child under the age of seven-

teen (17) years to become delinquent or neglected so as to come under the Juvenile Division of the Probate Court, whether or not such child shall in fact be adjudicated a ward of the Probate Court. (Emphasis added).

The maximum penalty permitted by the ordinance was a \$500.00 fine and/or 90 days in jail.

After Robinson's arrest, the customary complaint, police report and other documents were forwarded to the 51st District Court and the City Attorney's Office to commence the prosecution. Defendant Bailey, however, admitted sending a note to the presiding judge in an admitted effort to influence the judge's handling of the matter. The note read as follows:

Judge

This man has been a pain to our dept for the last week and a half (sic) We have given him rides to the city, just to get him out of the twp. If he plea's (sic) guilty could you give him 90 days.

Thanks
Cpl Bailey

In what we believe is an obvious effort to oblige Defendant Bailey's request, the Judge conducted an arraignment during which an unrepresented and clearly incoherent Robinson was held in lieu of bond in the amount of \$1,000 cash or surety. This bond doubled the maximum fine permitted under the ordinance.

Robinson remained in the Oakland County Jail for a period of 137 days while awaiting trial in the matter, 47 days more than the maximum jail sentence permitted under the ordinance.

He was removed from the jail only after his failing health became critical, and was taken to a nearby hospital. At the time of this transfer, no trial date had been set.

Robinson's death precluded his trial, thus there was never any disposition of the charges against him.

After Robinson failed to return home on the evening of May 24, 1980, his wife, the Petitioner herein, became alarmed and contacted several police agencies in an effort to locate her husband. This included numerous calls to the Waterford Police Department and the Oakland County Sheriff's Department which operates the Oakland County Jail. Each time contacted, officers with these departments denied any knowledge of Robinson's whereabouts. Mrs. Robinson did not learn of her husband's whereabouts for approximately five weeks after his arrest. She was informed of his detention by the minister of her church after he saw Robinson during an unrelated visit to the jail.

This action was commenced on May 6, 1982. The Complaint, insofar as it is pertinent to the individual respondents hereto, alleged causes of action under 42 USC §1983 for the arrest, imprisonment and prosecution of the decedent in violation of his rights protected by the fourth, fifth and fourteenth amendments to the United States Constitution, their deliberate indifference to the obvious medical needs of the decedent in violation of his fifth and fourteenth amendment right and a conspiracy on the part of the individual respondents to deprive the decedent of his right to a speedy trial before a fair and impartial tribunal.

Several state law claims which for the most part, correspond to the claimed constitutional torts were also alleged.

The Petitioner also alleged claims against the Township of Waterford under §1983. In addition to claims for failure to properly train, supervise and discipline, she also challenged the constitutionality of Section 5.3 of the Waterford Ordinance.

On September 23, 1983 the trial Court entered its order granting the Defendant Township's Motion for Partial Summary Judgment and denying the Plaintiff's Motion for Partial Summary Judgment. These cross motions addressed the constitutionality of the ordinance.

On December 22, 1983, the trial court entered its order granting in part and denying in part the Motion for Directed Verdict brought on behalf of the Defendants Tarpenting and Bailey. Insofar as the motion was granted, the Court directed a verdict in favor of these defendants on the allegation of conspiracy and on the allegation of the deliberate indifference to the decedent's medical needs.

On January 11, 1984, the Court entered its Judgment on the Verdict which adopted the jury's verdict of no cause of action as it relates to the claims against Defendants Tarpenting and Bailey.

The Court of Appeals affirmed the holding relative to the constitutionality of the ordinance, the judgment of no cause of action in favor of Tarpenting and Bailey on the issues of the arrest, imprisonment and prosecution of the decedent, but reversed the directed verdict on the issue of conspiracy.

The Court of Appeals also reversed the grant of attorney fees under 42 §1988 in favor of the Defendants Township, Donlin and Bedell.

Petitioner now seeks the review of this Court.

THE REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

CERTIORARI SHOULD BE GRANTED TO CLARIFY THE WEIGHT TO BE GIVEN TO A SPECIFIC INTENT REQUIREMENT IN AN ORDINANCE (OR STATUTE) WHICH IS OTHERWISE CONSTITUTIONALLY VOID-FOR-VAGUENESS.

As stated above, the decedent was charged with the offense of Disorderly Conduct pursuant to § 5.3 of Waterford Township Ordinance 87. (The complete text of Section 5.0 including § 5.3 is set forth, *supra*).

As the petitioner unsuccessfully argued in the trial court and in the Court of Appeals, the specific sub-section with which decedent was charged, does not "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement". *Kolender v Lawson*, 461 U.S. 352, 357 (1983). See also *Papachristou v City of Jacksonville*, 405 U.S. 156, 162 (1972); *Connally v General Construction Co*, 269 U.S. 385, 391 (1926); *Smith v Groven*, 415 U.S. 566, 574 (1974).

We also argued that the Waterford ordinance was substantially similar to the Cincinnati ordinance which was held to be unconstitutional in *Coates v City of Cincinnati*, 402 U. S. 611 (1971).

In *Coates*, supra the ordinance provided in pertinent part:

It shall be unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, streets, corners, vacant lots, or mouths of alleys, and there *conduct themselves in a manner annoying to persons* passing by or occupants of adjacent buildings. . . (Emphasis added).

Mr. Justice Stewart, writing for the majority stated:

We are thus relegated, at best to the words of the ordinance itself. . . Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, "men of common intelligence must guess at its meaning". (Citation omitted).

Justice Stewart went on to write that while the City has a legitimate interest in preventing "people from blocking sidewalks, obstructing traffic, littering streets, committing assaults or engaging in countless other forms of antisocial conduct . . . [i]t cannot constitutionally do so through the enactment

and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed".

We think the Waterford ordinance is fraught with vague and ambiguous concepts of prohibited conduct. Indeed, the ordinance fails to define any conduct which is itself unlawful, but rather any "course of conduct" or "repeatedly" committed acts which "alarm or seriously annoy another person" is unlawful if "no legitimate purpose" is served.

What is "alarming conduct"? What is seriously annoying conduct and how is that distinguished from merely annoying conduct? Whose threshold of tolerance provides the measuring stick for determining when any conduct becomes either annoying or alarming. How many times must a single act be committed before it is committed "repeatedly". Who determines which alarming acts have a legitimate purpose and which do not? Must the same person be "repeatedly" annoyed or alarmed, or is there a violation of the ordinance when several people are annoyed or alarmed, once each?

These questions are not entirely rhetorical. At the trial in this case, the trial court permitted the testimony of Ms. Opal Bledsoe, who worked as a security guard at the J. L. Hudson's Department store in another part of the mall. Ms. Bledsoe offered testimony of her encounter with Mr. Robinson in October of 1979, some seven months prior to his arrest on May 24, 1980. Despite the substantial dissimilarities in the purported conduct of Mr. Robinson on those two dates, the remoteness in time and place of the two occurrences, the total void of any common "victims" of the purported events and the fact that neither Defendant Tarpeneing nor Bailey were aware of the October incident at the time of the arrest May 1980, the testimony was permitted over Plaintiff's objections.

The Court of appeals essentially agreed with the petitioner by writing:

It is true that the ordinance is not overly specific regarding what conduct is proscribed.

The Court went on to comment:

In addition, the ordinance is not limited to a specific type of conduct or to conduct which takes place within a particular context, either of which limitation might help to lessen its vagueness.

The Court, however concluded, relying principally on *Boyce Motor Lines v United States*, 342 U.S. 342 (1951) and *Screws v United States*, 325 U.S. 91 (1945), that "[t]he intent requirement in the Waterford Township ordinance saves the ordinance from a vagueness challenged".

Although in *Boyce Motor Lines*, *supra*, and *Screws*, *supra*, as well as other cases cited by the Court of Appeals, this Court has held statutes otherwise constitutionally void-for-vagueness, to be constitutionally adequate with the added element of scienter, it has done so only when the intent requirement is coupled with the definiteness of a "decision or other rule of law". *Screws*, *supra*.

In *Screws*, *supra*, this Court stated:

We repeat that the presence of a bad purpose or evil intent alone *may not be sufficient*. We do say that a requirement of specific intent to deprive a person of a federal right *made definite by decision or other rule of law* saves the Act from any charge of unconstitutionality on grounds of vagueness (Emphasis added).

In the instant case, the element of scienter is not coupled with the definiteness of a "decision or other rule of law". To the contrary the Court of Appeals correctly observed:

Neither Waterford Township nor the Michigan State courts has made any effort to construe the terms "alarm" or "annoy" in such a manner as to limit their *inherent vagueness*. Conduct which "seriously annoys" is no less vague a concept than conduct which "annoys". (Emphasis added).

We submit that the Court of Appeals misapprehended the significance of the addition of the element of scienter to an

ordinance which does not itself define nor with reference to anything definite describe the conduct it attempts to proscribe. The addition of this element does nothing to further define annoying or alarming conduct, nor does it do anything to limit its arbitrary and capricious interpretation by police officers charged with the responsibility of its enforcement, as is evidenced by the events underlying this case.

So difficult was this question for the Court of Appeals to address, that Judge Milburn, although concurring, felt compelled to write separately:

I concur in the result reached by the majority. While I am of the view that the township ordinance is not unconstitutionally vague, I think it presents a close and difficult question.

We submit that certiorari should be granted to more clearly set forth the circumstances in which a vague statute is saved by an element of intent, and when it is not.

II.

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS RELATIVE TO THE PROPER STANDARD OF REVIEW ON THE QUESTION OF THE VER- DICT BEING AGAINST THE GREAT WEIGHT OF THE EVIDENCE

The Petitioner also sought reversal of the judgement entered on the verdict as against the great weight of the evidence. On this issue, we have found that the circuits are not in harmony on the appropriate standard of review to apply.

Offering only brief discussion on this question, the Court below disposed of the issue by citing its holding in *United States of America v Jenkins*, 871 F2d 598 (6th Cir 1989) and concluding that an examination of the record did not reveal that the verdict was against the great weight of the evidence.

In *Jenkins, v supra*, the Sixth Circuit held:

... A jury (verdict) must stand if there is substantial evidence, taking the view most favorable to the (prevailing party) to support it ...

The First Circuit held in *Insurance Company of North America v Musa*, 785 F2d 370 (1st Cir 1986) that a verdict may not be disturbed unless "the evidence and accompanying inferences 'point so strongly and overwhelmingly in favor of the movant that a reasonable jury could not have arrived at [the] conclusion' actually reached".

Thus, the Sixth Circuit as articulated by *Jenkins, supra*, looks to find "substantial evidence" which supports the verdict with a view most favorable to the verdict winner, while the First Circuit per *Musa, supra*, applies a test which must find that the evidence is "overwhelmingly" in favor of the verdict-loser before it will set aside the verdict.

The differences among the circuits on this question is not a recent phenomenon.

The Eighth Circuit in *Simpson v Shelly Oil Co*, 371 F2d 563 (8th Cir 1967) held that the court should examine the evidence, not in the light most favorable to the verdict-winner, but according to the analysis and appraisal by the Court of the weight of all evidence considering also any other relevant factors.

The Fifth Circuit held in *Hampton v Magnolia Towing Co*, 338 F2d 303 (5th Cir 1964) that the Court has discretion to set aside a verdict without regard to the strictures of the rule of substantial evidence.

We submit that the conflict among the circuits is both sharp and longstanding and certiorari should be granted to bring the circuits in harmony on this issue.

Futhermore, we submit that the Court below reached an erroneous result, regardless of the test applied.

We have already set forth above the testimony of Defendant Bailey in which he stated that he ordered the dece-

dent's arrest because he wanted him "out of the eyes of the general public". While we submit that this admission alone constitutes an impermissible ground for arresting (and in turn imprisoning and prosecuting) the decedent, no other testimony for either defendant could be construed as supportive of a legal arrest.

Our analysis begins with MCLA 764.15 which codifies the holdings of several cases interpreting the constitutional requirement that an arrest without a warrant for a misdemeanor or ordinance violation is legal, only when the purported violation occurs in the presence of the arresting officer. Given this requirement, we submit that there was no evidence of any description which could legitimize the May 24, 1989 arrest of William Robinson.

The testimony of the defendants themselves, was the only evidence to consider on this point.

First, no act of any description was committed in the presence of Defendant Bailey. He never saw the decedent at any time on the date of the arrest or at any other time during the decedent's life. Thus, it is an inescapable conclusion that the purported violation of ordinance was not committed in his presence, as constitutionally and statutorily required.

Second, Defendant Bailey admitted that he had no concern for what the decedent had done or was doing at the time he ordered his arrest. Instead, the defendant admitted that the sole reason for giving the order was that he didn't want the decedent to be seen by other members of the general public. Not only is such an admission a classic example of an arbitrary, unreasonable and illegal arrest, it bears no relationship to the offense with which the decedent was ultimately charged.

Thus, looking at this testimony in the light most favorable to this defendant, the arrest must be considered illegal. Any conclusion to the contrary ignores fundamental principals of constitutional law, and could have only resulted from a disregard of the Court's instructions.

Very consistent with the testimony of Defendant Bailey, Defendant Tarpening testified that the decision to arrest the decedent had been made prior to his arrival at the mall. Thus, it is undisputed that the decedent was to be arrested, without regard to his conduct, for his mere presence at the mall, a facility which invites members of the general public to enter. The decedent, notwithstanding his illness or even his undesirable body odor, remained a member of the general public and cannot be considered to have violated any law by merely entering a public facility.

If both defendants admitted, as indeed they did, that the decision to arrest the decedent was made before either of them saw him, how could a purported ordinance violation have been committed in their presence? We submit that it could not have been committed in their presence, thus the arrest was contrary to the statute and contrary to the fourth amendment. A verdict to the contrary must be considered as against the great weight of the evidence.

Defendant Tarpening went on to testify:

- 1) That upon his arrival at Sears, he observed the decedent seated in the cafeteria of the store with a cup of coffee (an act which we submit is not illegal).
- 2) That he observed Mr. Robinson drinking from the cup (again we do not believe this to be illegal, even under the Waterford ordinance).
- 3) That he observed the decedent leave his seat and walk towards the cafeteria exit (a lawful act).
- 4) That he then arrested the decedent.

The Defendant Tarpening offers testimony here which can only yield one conclusion. In this entire scenario, the decedent did not commit any act which could even be arguably construed as violative of the Waterford ordinance or any other law.

On the following day of trial, the Defendant was questioned by his own attorney. At that time he added the following facts to his account of the incident:

- 1) That upon his arrival at the store he was met by

Mr. Gregory Palmer who pointed out the decedent. (We submit that this testimony offered nothing to enhance the legality of the arrest).

2) That the decedent was mumbling to himself. (An act which, though peculiar, is not proscribed by any law).

3) That other patrons of the cafeteria were sitting in areas other than in the immediate proximity of the decedent (which is not an act of the decedent at all, but merely an observation of the seating choices of third parties which the Defendant stated he interpreted as being in direct response to the decedent).

Defendant Tarpene in this testimony does nothing but solidify Plaintiff's claim that the arrest was illegal. The verdict to the contrary ignores these admissions of the defendants, the requirements of MCLA 764.15, and the instructions of the Court. It is against the weight of the evidence.

Clearly, by any standard there was no evidence (much less substantial evidence) which supported a jury conclusion that the arrest was legal (or stated otherwise, that Plaintiff had not met her burden by showing that the arrest was illegal).

We thus submit that certiorari should be granted to resolve the conflict among the circuits. Once resolved, we submit that by any standard the judgment must be reversed.

III

CERTIORARI SHOULD BE GRANTED TO CLEARLY DEFINE THE SCOPE OF THE FEDERAL COURTS AUTHORITY AND RESPONSIBILITY WHEN EXERCISING PENDANT JURISDICTION OVER STATE LAW CLAIMS

As previously stated, the Petitioner brought claims arising under 42 USC §1983 as well as claims arising under Michigan common law. One of the State law claims alleged in this action was for malicious prosecution.

In Michigan, malicious prosecution is defined as the initiation of criminal proceedings, in the absence of probable cause and commenced with malice.

The Michigan Courts have held that an essential element to recovery for malicious prosecution is termination of the prosecution in favor of the accused. *Fort Wayne Mortgage Company v Carletos*, 95 Mich App 752 (1980). This requirement, however, actually does no more than to reinforce the required element that there be a lack of probable cause to commence the prosecution at its inception. The reason for this requirement is clear as a disposition of the prosecution which is disfavorable to the accused is the antithesis of a void of probable cause. The doctrine as it has evolved in the Michigan Courts, however, presupposes that a prosecution will receive a disposition of some description. However, like all judicially created tests or doctrines, the Court cannot anticipate every combination of facts which might present themselves, and when the Court faces a set of facts not contemplated at the time a doctrine is formulated, it must determine the applicability of the doctrine and must amend, modify or draw exceptions to it as the unique facts of any case may dictate.

In the case at bar, it was Plaintiff's theory that the Defendants arrested and incarcerated the decedent merely because they no longer wanted him free to wander the community. Defendant Bailey, in this testimony admitted precisely that reason.

The incarceration and prosecution was designed to keep the decedent off the streets and out of the mall for as long as possible. Another fact admitted by Defendant Bailey.

So determined was Bailey to accomplish this result that he engaged in impermissible communications with the Court, in an effort to elicit the Court's assistance in the desired result. This is the reason Bailey admitted that he wrote the above-described note.

Petitioner's theory continued that Bailey was apparently successful in his conspiratorial efforts as the Court ignored several statutes and court rules which govern the setting of bond, length of pre-trial detention for misdemeanor suspects unable to post bond and procedural requirements for notification of next of kin for criminal defendants who present an apparent mental incapacity. As a result the decedent was held on \$1000.00 cash bond (an amount 10 times greater than permitted by statute, and twice as much as the maximum fine permitted by the ordinance), and for 137 days (47 days longer than the maximum sentence permitted by the ordinance).

The decedent was released from the jail only after his rapidly failing health could no longer be ignored and he died before his trial ever occurred. At the time he was transferred to the hospital, no trial date had been set, leaving us only to speculate how much longer he would have been held without trial had he not become so ill.

Because of these unique facts, there was no termination of the prosecution in the decedent's favor, as there was no termination of the prosecution (until death).

If, as we submit, this final element to the claim was never realized because the defendants themselves frustrated its occurrence, clearly the Michigan Court could address the applicability of the doctrine and modify it accordingly.

The Court below never reached the merits of this argument, because it refused to consider the limitations (and thus the inapplicability) of the Michigan doctrine.

The Court stated:

A federal court is not the proper forum to seek an exception to this well-established rule of state law.

We think this analysis avoids the issue rather than addresses it.

When exercising pendant jurisdiction, the Federal Court is bound to follow the substantive law of the State. However,

we submit that when faced with a matter of first impression, the Court must also place itself in the position of the State Court and act in a manner it believes the State Court would act.

Thus, we submit that in the absence of any precedent which address this issue, the Court should have considered the merits of the Petitioner's argument and acted as it believed the Michigan Court would have acted under the same circumstances.

We know of no authority which supports the conclusion that the federal forum is bound to blindly follow a state law doctrine, when exercising pendant jurisdiction, when the doctrine itself could not have been formulated with the unique facts of the case in mind.

For these reasons we submit that Certiorari should be granted to more clearly define the responsibility of the federal court when exercising pendant jurisdiction.

Respectfully submitted,

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NOTE FOR PUBLICATION

No. 84-1579

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HELEN ROBINSON, Personal
Representative of the Estate of
WILLIAM ROBINSON, Deceased,
Plaintiff-Appellant,

v.

THE TOWNSHIP OF WATERFORD,
WATERFORD TOWNSHIP POLICE,
DEPARTMENT, WILLIAM STOKES,
OFFICER BAILEY, OFFICER T.
TARPENING, PETER DONLIN, WALTER
BEDELL, THE COUNTY OF OAKLAND,
OAKLAND COUNTY SHERIFF'S
DEPARTMENT, AND JOHANNES SPREEN,
Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE EASTERN
DISTRICT OF MICHIGAN

Decided and Filed _____

BEFORE: JONES, MILBURN, and BOGGS, Circuit Judges.

BOGGS, Circuit Judge. This case involves an action under 42 U.S.C. § 1983 against officials of Waterford Township and Oakland County for injuries arising from the arrest, imprisonment and subsequent death of William Robinson. Plaintiff-Appellant, Helen Robinson, as personal representative of her husband's estate, appeals various orders of the district court made during the course of the action granting summary judgment in favor of certain of the defendants before the case went to the jury. She also appeals the award of attorney fees granted certain of the defendants, various evidentiary rulings made during the course of the trial, and certain parts of the jury verdict as against the weight of the evidence. We reverse several of the district court's orders and remand to the district court for further proceedings in accordance with this opinion.

I

This case arises out of a tragic series of events which began over the Memorial Day week-end in 1980 at the Sears Department store in Pontiac Mall, located in Waterford Township, Oakland County, Michigan. William Robinson was a retired factory worker who suffered from Alzheimer's Disease, or Organic Brain Syndrome. He was forgetful and could not communicate easily. His urine and bowels were incontinent and he could not keep himself clean. As a result he exhibited a strong and noticeably offensive body odor. He frequently mumbled to himself and chewed on foreign objects. He spent most of his time wandering the streets and local shopping malls, particularly the Pontiac Mall. His strange behaviour and strong body odor attracted attention from shoppers, and did not make him popular with shopkeepers. Sometimes he would order coffee or food at a cafeteria and would not be able to pay for the purchase. The Waterford Township police were alerted on several occasions. Their usual response was to escort Mr. Robinson home, or to a local shelter such as the Pontiac Mission or the Salvation Army. On a few occasions, they merely transported him to the Waterford Township boundary and dropped him outside the city limits.

On Saturday, May 24, 1980, William Robinson wandered into the cafeteria inside the Sears store. According to the testimony of Gregory Palmer, a security guard at Sears, Mr. Robinson wandered into a restricted area of the store and was asked to leave. Later that day, he walked through the food service line at the Sears cafeteria, removing bread from sandwiches and putting it in his pockets. He got a cup of coffee and walked past the cashier without paying, although he asked several customers for money. He then sat down at a cafeteria table and poured sugar into his coffee and onto the table. At this point, the security guard, Mr. Palmer, requested that Mr. Robinson leave the store. When Mr. Robinson did not depart, Mr. Palmer called the Waterford Township Police.

Corporal Bailey of the Waterford Township Police Department dispatched Officer Timothy Tarpenting with instruc-

tions to arrest Mr. Robinson. Bailey testified that he made the decision to arrest Mr. Robinson because of the problems they had had with him all week, and because the police had more important things to do over the holiday week-end than to transport Robinson back and forth. He admitted that he knew of no warrant for Robinson's arrest, and Robinson has done nothing in his presence. Bailey stated that he thought that Robinson would get adequate care at the County Jail.

Officer Tarpenting did arrest Mr. Robinson, charging him with harassment under § 5.3 of Waterford Township Ordinance No. 87, which deals with various types of disorderly conduct. Mr. Robinson was taken to the Oakland County Jail. Shortly thereafter, Corporal Bailey sent a note to the judge to whom Robinson's case was assigned, asking him to sentence Robinson to the maximum 90-day sentence if he were found guilty. Mr. Robinson was arraigned before this judge on Tuesday, May 27, 1980, the day after Memorial Day. The record indicated that he did not understand why he was there or the nature of the charge against him. The judge set bond at \$1,000.

Mr. Robinson remained in the Oakland County jail, awaiting trial on a charge with a maximum 90-day sentence, for 137 days. During this period, he received no medical treatment and was not bathed or showered. Despite requests to the police department, Mrs. Robinson did not find out that her husband was in jail for approximately 3 to 4 weeks after his arrest. Mr. Robinson eventually was found incompetent to stand trial. He then was hospitalized at a local hospital and later transferred to the Veteran's Administration Hospital in Battle Creek. He died there on October 15, 1981, after choking on some food.

Mrs. Robinson brought suit against the Township of Waterford, the Waterford Township Police Department, Chief of Police William Stokes, Officers Bailey and Tarpenting, Waterford Township Prosecutors Peter Donlin and Walter Bedell, the County of Oakland, the Oakland County Sheriff's Department, and Sheriff Johannes Spreen (defendants). She accused

the defendants of acts and conspiracies allegedly resulting in the false arrest and imprisonment of Mr. Robinson, and in the injuries from lack of medical treatment and hygiene while in jail. She further claimed that the defendants violated Mr. Robinson's rights by maliciously initiating and continuing a criminal prosecution in the absence of probable cause. She requested compensatory and punitive damages for Mr. Robinson's injuries under 42 U.S.C. § 1983.

The defendants filed, and the court granted, a series of pre-trial motions to dismiss and for summary judgment, from which Mrs. Robinson now appeals. Oakland County's motion to dismiss the claim against the County was granted on August 8, 1982. On December 23, 1982, the district court granted a motion for summary judgment on behalf of Peter Donlin and Walter Bedell on the basis of prosecutorial immunity. The court granted summary judgment to the Waterford Township Police Department and Police Chief William Stokes on April 11, 1983. The Waterford Township Disorderly Conduct Ordinance was held to be constitutional on September 21, 1983; and Waterford Township's motion for summary judgment was therefore granted on November 23, 1983.

The remaining defendants, namely Officers Bailey and Tarpenting, the Oakland County Sheriff's Department and Sheriff Spreen, defended in a jury trial held in December 1983. On December 22, 1983, the district court granted Sheriff Spreen's motion for a directed verdict on the conspiracy charges, but denied the motion as to the alleged due process violations based on deliberate neglect and indifference. The court also directed a verdict for Corporal Bailey and Officer Tarpenting on the issues of conspiracy, deliberate indifference, and the pendent state law claim of malicious prosecution, but not as to their liability for false arrest or imprisonment or punitive damages. The jury returned a verdict in favor of Corporal Bailey and Officer Tarpenting, but found Sheriff Spreen liable for \$300,000 in compensatory damages and \$400,000 in punitive damages. Mrs. Robinson accepted a remittitur of \$300,000, which was ordered by

the district court, rather than pursuing a new trial. Judgment was entered on January 23, 1985. The sheriff did not appeal. The district court awarded attorney fees of \$13,333.50 to prevailing defendants Waterford Township Prosecutors Peter Donlin and Walter Bedell and Waterford Township under 42 U.S.C. § 1983.

II

Mrs. Robinson first appeals the district court's holding that Waterford Township Ordinance No. 87, § 5.3 was not unconstitutionally vague as applied to Mr. Robinson's conduct. Section 5 of the Disorderly Conduct Ordinance prohibits various types of harassing conduct as follows:

5.0 HARRASSMENT [sic]. A person commits the offense of harrassment[sic] if, with intent to harass, annoy or alarm another person he or she:

5.1 Strikes, shoves, kicks or otherwise touches a person or subjects him or her to physical contact.

5.2 Follows a person in or about a public place or places.

5.3 Engages in a course of conduct or repeatedly commits acts that alarm or seriously annoy another person, and which acts or conduct serve no legitimate purpose.

5.4 Contributes to the delinquency of a minor by any act, or by any word, shall contribute toward, cause or tend to cause any minor child under the age of seventeen (17) to become delinquent or neglected so as to come under the Juvenile Division of the Probate Court, whether or not such child shall in fact be adjudicated a ward of the Probate Court.

Mr. Robinson was charged under § 5.3 of the ordinance.

The district court held that this ordinance was not unconstitutionally vague or overbroad in an opinion issued from

the bench on September 21, 1983. The court distinguished this ordinance from the ordinance before the Supreme Court in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), which made it a crime for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . ." The Supreme Court held that the Cincinnati ordinance was "unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct." *Id.* at 614. The district court found that § 5.3 of the Waterford Township ordinance was distinguishable because of the requirements that the conduct be repeated, that it be intentional, and that it not be for any legitimate purpose.

A

We agree with the district court that the ordinance is not unconstitutionally overbroad because it does not reach constitutionally protected conduct. The ordinance is not applicable to speech or other exercise of first amendment rights, for such activities would come within the exception for serving a legitimate purpose.

However, our conclusion that the ordinance is not overbroad does not resolve the question of its vagueness. Vagueness and overbreadth analyses are often inextricably interwoven, particularly in first amendment jurisprudence; however, they remain logically independent doctrines. Stone, Seidman, Sunstein & Tushnet, *Constitutional Law* 1043 (1986).

B

The Supreme Court has established a dual rationale for the void-for-vagueness doctrine of the due process clause:

A penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can under-

stand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

Kolender v. Lawson, 461 U.S. 352, 357 (1983). Fundamental fairness requires that persons of common intelligence not be compelled to guess at their peril whether or not their conduct may fall within the reach of a criminal statute. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). Criminal statutes must draw reasonably clear lines between behaviour which is forbidden and that which is not. *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

The requirement that criminal statutes delineate clear standards of behaviour serves two purposes: it provides fair warning to citizens of the consequences of their conduct; and it also prevents arbitrary or discriminatory enforcement of the criminal law. The Supreme Court has recognized

that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine — the requirement that a legislature establish minimal guidelines to govern law enforcement." Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predictions."

Kolender, 461 U.S. at 35 (citations omitted).

We agree with the district court's determination that § 5.3 of the Waterford Township Disorderly Conduct Ordinance is constitutional under both rationales supporting the void-for-vagueness doctrine. The ordinance gave a reasonable person fair notice that his conduct might fall within the reach of the statute,¹ and did not allow the Waterford Township Police to enforce the ordinance against him in an arbitrary manner.

¹ Because of Mr. Robinson's condition, he may well have been incapable of forming an intent or comprehending what conduct of his might violate a statute. However, those matters go to an individual defense, and do not invalidate the statute on its face.

It is true that the ordinance is not overly specific regarding what conduct is proscribed. The ordinance makes it a crime to "engage in a course of conduct or repeatedly commit acts that alarm or seriously annoy another person . . ." The Supreme Court held the disorderly conduct statute in *Coates*, 402 U.S. 611, unconstitutionally vague because the word "annoy" was the only word used to define or limit the offense.

The Court rejected the Ohio Supreme Court's reliance on the well-understood dictionary definition of the word. It held the statute vague because:

Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensive normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, men of common intelligence must necessarily guess at its meaning.

402 U.S. at 614. Neither Waterford Township nor the Michigan state courts has made any effort to construe the terms "alarm" or "annoy" in such a manner as to limit their inherent vagueness. Conduct which "seriously annoys" is no less vague a concept than conduct which "annoys".

In addition, the ordinance is not limited to a specific type of conduct or to conduct which takes place within a particular context, either of which limitation might help to lessen its vagueness. For example, the Supreme Court upheld an anti-noise ordinance, stating that "no person . . . adjacent to . . . a school . . . in session . . . shall willfully make . . . any noise or diversion which disturbs or tends to disturb the peace or good order of such school session . . ." against a vagueness challenge in *Grayned v. City of Rockford*, 408 U.S. 104 (1971). The Court held that the ordinance was sufficiently precise because the conduct was prohibited at a fixed place at fixed times, finding that "given this 'particular context,' the ordinance gives 'fair notice to whom [it] is directed.'" *Id.* at 112.

Similarly, the Fifth Circuit has upheld a federal statute, 18 U.S.C. § 112, specifically prohibiting harassment of foreign officials because the statute delineated a particular context. *CISPES v. F.B.I.*, 770 F.2d 468, 476-77 (5th Cir. 1985).

However, Waterford Township argues, and we agree, that the ordinance is saved from a vagueness challenge because of the specific intent requirement. The Supreme Court repeatedly has recognized that a scienter requirement may save a statute that might otherwise be unconstitutionally vague. *Boyce Motor Lines v. United States*, 342 U.S. 342 (1951); *Screws v. United States*, 325 U.S. 91, 101-103 (1945). We have held that "effect of the scienter standard on the vagueness . . . of a statute must be examined on a case-by-case basis in the context of the particular statute at issue." *Record Revolution No. 6, Inc. v. City of Parma*, 638 F.2d 916, 934 (6th Cir. 1980), *vacated and remanded on other grounds*, 456 U.S. 968 (1982).

The intent requirement in the Waterford Township ordinance saves the ordinance from a vagueness challenge. In *Screws v. United States*, 325 U.S. 91, 103 (1945), the Supreme Court clearly stated that "a requirement of a specific intent to [violate a statute] saves the Act from any charge of unconstitutionality on the grounds of vagueness." This court has recently followed that rule, stating that an "explicit intent requirement saves [a] statute from [a] claim of vagueness." *United States v. 57,261 Items of Drug Paraphernalia*, 869 F.2d 955, 957 (6th Cir. 1989). That case also notes that *Record Revolution* is no longer good law on vagueness. *Ibid.* (citing *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489 (1982)). Further, other courts have noted that "[t]he Supreme Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*," or intent. *United States v. Stewart*, 872 F.2d 957, 959 (10th Cir. 1989).

The ordinance challenged here contains an explicit requirement of a specific intent to annoy others. The only case

striking down a disorderly conduct statute despite a clear intent requirement is *Kramer v. Price*, 712 F.2d 174 (5th Cir. 1983), which illustrates quite well the faults of such an approach. In that case, a panel of the 5th Circuit held, 2-1, that a statute quite similar to the Waterford Township ordinance was unconstitutional on its face. Thus, the panel prevented the prosecution of a woman who mailed to the wife of her ex-boyfriend, newly arrived home from the hospital with their new baby, a solicitation announcing: "Baby Problem Solved! — with this beautiful ALL METAL CASKET-VAULT COMBINATION CRYPT a CRIB."

Despite the outrageous and despicable nature of this conduct, the majority held that any use of words such as "harass or annoy" was inherently vague, as not specifying the sensitivity by which "annoy" could be measured. Judge Rubin, in a well-reasoned dissent, pointed out the importance of an intent requirement, as laid out in the cases cited above:

What is unlawful is not a communication that *might* offend any of the myriad of persons who passes, regardless of the communicator's purpose; the statute limits unlawful conduct to what not only "may" but is also intended to annoy. . . ."

Id., at 180.

The panel opinion subsequently was vacated, and an ensuing *en banc* decision, 723 F.2d 1164 (5th Cir. 1984), upheld the lower court's dismissal of the action against the mailer, "but without approving or adopting its rationale." In keeping with Supreme Court precedent, as well as a prior case law in this and other jurisdictions, and Judge Rubin's opinion, we hold that section 5.3 of the Waterford Township ordinance is not unconstitutional on its face. Accordingly, we affirm the decision of the district court.²

² Mrs. Robinson made a separate argument for municipal liability based on inadequate training and supervision of the police officers. The jury, however, found that officers had acted properly. Because we conclude

III

The district court granted summary judgment in favor of Oakland County, holding that the county could not be vicariously liable for the abuses of the sheriff's department. However, this decision was reached before publication of our opinion in *Marchese v. Lucas*, 758 F.2d 181 (6th Cir. 1985), *cert. denied*, 107 S.Ct. 1369 (1987). *Accord Dorsey v. City of Detroit*, 858 F.2d 338 (6th Cir. 1988); *Parker v. Williams*, 855 F.2d 763 (6th Cir. 1988). In *Marchese*, we held Wayne County liable for the actions of its sheriff's department because the sheriff makes police policy for the county even though under the Michigan constitution the county cannot control the sheriff. *Marchese, supra*. However, Oakland County and plaintiff reached a settlement resulting in an agreed dismissal of the appeal against Oakland County. Thus, we have no occasion to consider this issue further.

IV

The district court granted summary judgment to town prosecutors Peter Donlin and Walter Bedell, holding that they enjoyed absolute immunity from prosecution. Prosecutors have absolute immunity for actions carried out in their role as advocates, but not necessarily for actions which are purely administrative in nature. *Imbler v. Patchman*, 424 U.S. 409 (1976). Mrs. Robinson argues that the prosecutors' failure to bring Mr. Robinson to trial or release him after 90 days was an administrative decision for which Donlin and Bedell should not enjoy immunity.

We agree with the district court that scheduling cases is part of the prosecutor's role as advocate. "The determina-

that the jury verdict was not against the great weight of the evidence, we need not reach the issue of whether the Township could be held liable under the Supreme Court's recent decision in *City of Canaton, Ohio v. Harris*, 57 U.S.L.W.4270 (U.S. Feb. 28, 1989), for a failure to train the officers.

tion as to when the state is ready to proceed in the trial of a given case is one in which the prosecutor must be free to exercise . . . unfettered discretion." *Cribb v. Pelham*, 552 F. Supp. 1217 (D.S.C. 1982). *Accord Joseph v. Patterson*, 795 F.2d 549 (6th Cir. 1986); *Andree v. Ashland County*, 818 F.2d 1306 (7th Cir. 1987). Thus, we hold that the prosecutors enjoy absolute immunity under *Imbler* with respect to the scheduling of cases and therefore affirm the order of the district court.

V

A

Mrs. Robinson charged in her complaint before the district court that a conspiracy existed between Corporal Bailey, Officer Tarpenting and the municipal judge to deprive Mr. Robinson of his constitutional rights by arresting him without probable cause and confining him as long as possible. Mrs. Robinson argued that evidence of the conspiracy was found in Corporal Bailey's instructions to Officer Tarpenting to arrest Mr. Robinson before he had been to the scene, Officer Tarpenting's carrying out of those instructions despite the fact that no misdemeanor was committed in his presence, Corporal Bailey's note to the judge requesting the maximum sentence, the judge's high bail, and the inordinate length of time Mr. Robinson spent in jail before being found incompetent to stand trial.

The district court would not allow the issue of conspiracy go the jury, holding that it would lead to the "rankest speculation" on the jury's part. Instead, the court granted a motion for a directed verdict on behalf of Corporal Bailey and Officer Tarpenting on this issue.

In considering a motion for a directed verdict, this court must view the evidence in a light most favorable to the party against whom the motion is made, and decide whether reasonable people could come to only one conclusion based on

the evidence. *Davis v. Sears, Roebuck and Co.*, 873 F.2d 888, 897 (6th Cir. 1989); *Coffy v. Multi-County Narcotics Branch*, 600 F.2d 570, 579 (6th Cir. 1979). Viewing the evidence presented in the record in the light most favorable to Mrs. Robinson, we hold that reasonable people could have concluded that a conspiracy existed. We agree with the reasoning of the Seventh Circuit that:

In order to prove the existence of a civil conspiracy, a plaintiff is not required to provide direct evidence of the agreement between the conspirators, "[c]ircumstantial evidence may provide adequate proof of conspiracy," Thus the question whether an agreement exists should not be taken from the jury in a civil conspiracy case so long as there is a possibility that the jury can "infer from the circumstances [that the alleged conspirators] had a 'meeting of the minds' and thus reached an understanding" to achieve the conspiracy's objectives.

Hampton v. Hanrahan, 600 F.2d 600, 620 (7th Cir. 1979).

We therefore reverse the district court's directed verdict in favor of Officers Bailey and Tarpening and remand to allow the issue of conspiracy to be presented to a jury.

B

The jury returned a verdict in favor of Officers Bailey and Tarpening on Mrs. Robinson's claims of false arrest and imprisonment. Mrs. Robinson argues that the jury verdict is against the great weight of the evidence and should be overturned. A jury verdict must be upheld unless it is against the weight

of the evidence. *United States of America v. Jerkins*, 871 F.2d 598, 606 (6th Cir. 1989). Based on our examination of the record, we conclude that the jury verdict was not against the great weight of the evidence and accordingly will not be disturbed.³

C

The district court directed a verdict in favor of Officers Bailey and Tarpening on the pendent state law claim of malicious prosecution. The directed verdict on this issue must stand. Plaintiff has not met one of the requisite elements of a malicious prosecution claim, namely that the proceedings must terminate in favor of the accused. *Fort Wayne Mortgage Company v. Carletos*, 95 Mich. App. 752, 757 (1980). A federal court is not the proper forum to seek an exception to this well-established rule of state law.

VI

The District court awarded attorney fees under § 1988 to prevailing defendants town prosecutors Peter Donlin and Walter Bedell. The court also awarded attorney fees to Waterford Township for defending the claim based on the failure to train, but not for its defense of the constitutionality of the ordinance.

The decision to award attorney fees is committed to the discretion of the trial judge. 42 U.S.C. § 1988; *Christiansburg*

³ The district court allowed testimony from the Sears security guard, Gregory Palmer, and from another security guard, Opal Bledsow, as to previous disruptive incidents with Mr. Robinson. Mrs. Robinson argues that the evidence of similar bad acts should not have been admitted in that it was offered to prove Mr. Robinson's bad character. We agree with the district court that the prior act evidence was properly admissible under Fed. R. Evid. 404(b) not to prove character but to prove that Mr. Robinson in fact violated the ordinance by *repeatedly* committing annoying acts.

Garment Co. v. EEOC, 434 U.S. 412, 424 (1978); *Tarter v. Raybuck*, 742 F.2d 977, 986 (1984). The standard of appellate review of a district court's award of attorney fees to a prevailing party under § 1988 is whether the trial court abused its discretion in making or denying the award. *Tarter*, 742 F.2d at 986.

In *Christiansburg*, 434 U.S. 412, the Supreme Court set out the standard basis for awarding attorney fees to prevailing defendants in civil rights cases. The Court stated that "a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Id.* at 422. This test should be applied strictly in favor of plaintiffs, and attorney fees should not be too frequently awarded to prevailing defendants in light of the overriding congressional policy of encouraging vindication of rights. *Smith v. Smythe-Cramer*, 754 F.2d 180, 184 (6th Cir. 1986).

Accordingly, we hold that the district court abused its discretion in granting attorney fees to the prevailing defendants in this case. The district court must not engage in "post hoc reasoning" by concluding that a plaintiff's suit was frivolous merely because she ultimately does not prevail on the merits. *Christiansburg*, 434 U.S. at 421-22; *Smith* 754 F.2d at 183.

There can be no doubt that the issues raised in this case were not raised frivolously. For example, although Mrs. Robinson's argument that case scheduling was an administrative function not entitled to prosecutorial immunity did not ultimately prevail, it was not an unreasonable or frivolous argument. The issue had not been finally settled in any circuit by unambiguous case law, and had not been considered at all within our circuit. Likewise, the attorney fees awarded to Waterford Township for defending the claim of municipal liability cannot stand. The record does not support the trial court's conclusion that this claim was frivolous. Although many years have passed since the Supreme Court held that municipali-

ties could be sued as "persons" within the meaning of § 1983 in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (19789), municipal liability under § 1983 is still an extremely unsettled area of the law. There is case law supporting Mrs. Robinson's argument that some types of inadequate training or supervision can rise to a level sufficient to support § 1983 liability. *City of Canton, Ohio v. Harris*, 57 U.S.L.W. 4720 (U.S. Feb. 28, 1989); *Turpin v. Mailet*, 619 F.2d 1242 (2d Cir. 1980).

Thus, we conclude that the district court applied the *Christiansburg* standards incorrectly and abused its discretion in awarding attorney fees for defendants. Accordingly, the order of the district court is **REVERSED**.

VII

The judgment of the district court is **AFFIRMED** in part and **REVERSED** in part. The case is **REMANDED** to the district court for further proceedings in conformity with this opinion.

ISSUED AS MANDATE: September 29, 1989

COSTS: NONE

No. 84-1579

Helen Robinson v. Township of Waterford, et al.

MILBURN, Circuit Judge, concurring. I concur in the result reached by the majority. While I am of the view that the township ordinance is not unconstitutionally vague, I think it presents a close and difficult question.

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NO. 84-1579
UNITED STATES COURTS OF APPEALS
FOR THE SIXTH CIRCUIT

HELEN ROBINSON,
Plaintiff-Appellant

vs.

ORDER

TOWNSHIP OF WATERFORD, ET AL.,
Defendants-Appellees

This matter is before the court upon consideration of petitions for rehearing filed separately by the appellant and the appellees of this court's August 18, 1989 opinion affirming in part, reversing in part and remanding the decision of the district court.

This court having carefully examined the petitions and the record finds it misapprehended no question of law or fact in its August 18, 1989 opinion.

It is therefore **ORDERED** that the petitions be, and they hereby are, **denied**.

ENTERED BY ORDER OF THE
COURT

Leonard Green, Clerk

/s/ LEONARD GREEN